BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTOPHER DOWSEY	)	
Claimant	)	
VS.	)	
	)	Docket No. 225,210
INDUSTRIAL ELECTRIC COMPANY	)	
Respondent	)	
AND	)	
	)	
EMPLOYERS MUTUAL CASUALTY COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant and respondent both request review of the Award entered by Administrative Law Judge Bruce E. Moore on December 21, 1998. The Appeals Board heard oral argument July 20, 1999.

APPEARANCES

William L. Townsley, III, of Wichita, Kansas, appeared on behalf of claimant. James M. McVay of Great Bend, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant benefits for a work disability with the extent of disability based on a varying wage loss and a task loss of 21 percent. For the task loss finding, the ALJ relied exclusively on the opinion of Dr. Kris Lewonowski and rejected the opinion of Dr. Pedro A. Murati. On appeal, claimant contends the opinion of Dr. Murati should also be considered and, in fact, should be given greater weight than the opinion of Dr. Lewonowski. In addition, claimant contends the ALJ failed to notice that Dr. Lewonowski changed his opinion during the cross examination and argues the final opinion of Dr. Lewonowski gives a higher task loss percentage than that used by the ALJ.

Respondent argues that the ALJ's finding as to task loss should be affirmed. But respondent contends that the ALJ erred by adding $112 per week to claimant's average weekly wage for the company vehicle claimant was permitted to use. If the $112 is excluded from the preinjury wage, the wage loss component of the work disability would be correspondingly lower.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified.

Findings of Fact

1. Claimant, who performed maintenance and repair on pipeline and oil field machinery, injured his low back on June 5, 1996, while pulling a 6-foot steel rod in an effort to align the bolt holes.

2. Dr. Jacob Amrani, an orthopedic surgeon, recommended surgery. Claimant asked for a second opinion and was seen by Dr. Lewonowski. Dr. Lewonowski first provided conservative care and then he also recommended surgery.

3. On January 15, 1997, Dr. Lewonowski performed a decompression and posterior spinal fusion from L4-5 to L5-S1 with harvest of iliac crest for the bone graft and implanted an electrical stimulator. The stimulator was removed August 21, 1997. Dr. Lewonowski released claimant to return to work in October 1997 after an FCE.

4. Based on the FCE, Dr. Lewonowski limited claimant to medium category of work with lifting limited to 50 pounds occasionally and 30 pounds frequently. Dr. Lewonowski also generally agreed with the FCE recommendation that claimant have a frequent opportunity to change positions among sitting, standing, and walking.

5. Dr. Lewonowski reviewed a list, prepared by Ms. Karen C. Terrill, of the tasks claimant had performed in the work he did during the previous fifteen years. Dr. Lewonowski initially testified that he agreed with Ms. Terrill's conclusion that claimant cannot now do 6 of a total of 28 non-duplicative tasks, or 21 percent. On cross examination, Dr. Lewonowski agreed that there were two additional tasks, operating the panel saw and retrieving tools, claimant cannot now perform. Dr. Lewonowski, therefore, identified a total of 8 of the 28, or 29 percent, tasks claimant cannot now perform.

6. Dr. Murati also examined claimant, at the request of claimant's counsel, and provided opinions on work restrictions and task loss. Dr. Murati indicated claimant could occasionally sit, frequently stand or walk, and occasionally bend, climb ladders, squat, crawl, and drive. He recommended claimant not repetitively operate foot controls with the left extremity. As lifting restrictions, he limited claimant to 35 pounds occasionally, 20

pounds frequently, and 10 pounds constantly. He also recommended claimant use lumbar support while lifting and use good body mechanics at all times.

Dr. Murati also reviewed the list of tasks prepared by Ms. Terrill. He concluded claimant cannot do 24, or 86 percent, of the 28 total tasks listed. Among the tasks eliminated were ones eliminated because they were described as requiring constant sitting or standing when, in fact, the claimant performed the task 5 percent of the day or less.

7. Respondent provided claimant a pickup which he drove to and from work each day, a round trip of 80 miles. Claimant was on call 24 hours per day.

8. Claimant was not able to return to work for respondent after the injury. Claimant did not work from the time of his release by Dr. Lewonowski in October 1997 until he went to work for United Methodist Youthville on June 30, 1998. The ALJ found claimant made good faith effort to find work during the period he was not employed. The ALJ also found that, at United Methodist Youthville, claimant had an average weekly wage, including health insurance and life insurance, of $363.57 from June 30, 1998, through August 22, 1998. As of August 23, 1998, the wage increased to $399.32 per week. Neither party challenges these findings on appeal.

Conclusions of Law

1. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

2. The Board concludes claimant has, as a result of this injury, lost the ability to perform 29 percent of the tasks he performed in the work he did during the 15 years before the accident. This conclusion is based on the opinion of Dr. Lewonowski. For reasons similar to those cited by the ALJ, the Board does not consider the opinion of Dr. Murati to be reliable. The Board does not believe, as apparently the ALJ did, that the fact Dr. Murati ignored the FCE is a valid basis for discarding his opinion. But the Board does agree that it was improper to eliminate, as Dr. Murati did, tasks which the claimant did only briefly on the basis of a restriction against constant sitting or constant standing. For that reason, the Board finds the opinion of Dr. Lewonowski more persuasive and has relied on that opinion.

The ALJ relied on Dr. Lewonowski's opinion but did not include the modification made at the deposition. Dr. Lewonowski's corrected opinion was that claimant could not perform 8 of 28 tasks, or 29 percent, and that is the finding of the Board.

3. K.S.A. 44-511 defines average weekly wage to include the weekly value of remuneration in a medium other than money. The value of such benefits is calculated on the basis of the cost to the employer. In this case, the ALJ calculated the cost of the use of the vehicle at the then applicable state rate of 28 cents per mile for the mileage to and from work. The Board finds this to be a reasonable basis for calculating the cost to the employer and affirms the decision to add $112 to the weekly wage for the use of the vehicle.

4. Except for the challenge to the addition of $112 to the preinjury wage, the parties do not dispute the ALJ's findings on wage loss. The Board has affirmed the addition of the $112 and adopts the wage loss findings as follows: (1) for the period October 14, 1997, when claimant was released by Dr. Lewonowski, until June 30, 1998, when claimant first went to work, the wage loss was 100 percent; (2) from June 30, 1998, through August 22, 1998, the wage loss was 56 percent; and (3) beginning August 23, 1998, the wage loss is 52 percent.

5. Averaging the 29 percent task loss with the wage loss, as required by K.S.A. 44-510e, the Board finds claimant's work disability to be as follows: (1) for the period from October 14, 1997, until June 30, 1998, the work disability was 64.5 percent; (2) for the period from June 30 through August 22, 1998, the work disability was 42.5 percent; and (3) beginning August 23, 1998, the work disability is 40.5 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award should be, and is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Christopher Dowsey, and against the respondent, Industrial Electric Company, and its insurance carrier, Employers Mutual Casualty Company, for an accidental injury which occurred June 5, 1996, for 69 weeks of temporary total disability compensation at the rate of $326 per week or $22,494; followed by 37 weeks at the rate of $326 per week, or $12,062, for the period from October 14, 1997, through June 29, 1998, when his work disability was 64.5%; followed by 7.71 weeks at $326 per week, or $2,513.46, for the period of June 30, 1998, through August 22, 1998, when his work disability was 42.5%; followed by 101.5 weeks at $326 per week, or $33,089, for the period beginning August 23, 1998, which represents the total of 146.21 weeks to be paid for a 40.5% disability less the 44.71 weeks of permanent partial disability previously paid. The total award is, therefore, $70,158.46,

including $22,494 in temporary total disability compensation and $47,664.46 in permanent partial disability compensation.

As of August 31, 1999, there is due and owing claimant 69 weeks of temporary total disability compensation at the rate of $326 per week or $22,494, followed by 99.86 weeks of permanent partial disability compensation paid at $326 per week or $32,554.36, for a total due and owing of $55,048.36, ordered paid in one lump sum less any amounts previously paid. The remaining 46.35 weeks of permanent partial disability compensation is to be paid at the rate of $326 per week, for a total of $15,110.10, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered in the Award by the Administrative Law Judge not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of August 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Townsley, III, Wichita, KS
James M. McVay, Great Bend, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director